Chan Eng Lim & Ors v Camille Yap and another application

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NOS 24–37–03 OF 2012 AND 24–124–07 OF 2012
NORAINI ABDUL RAHMAN J
12 NOVEMBER 2013

Family Law — Children — Guardianship — Illegitimate children — Application for guardianship, custody, care and control of child — Child born to unmarried persons — Simultaneous applications for guardianship, custody, care and control of child made by mother and maternal grandparents on one hand and paternal grandparents on other hand — Welfare of child of paramount importance — Whether principles in s 88(3) of the Law Reform (Marriage and Divorce) Act 1976 to be considered

The third plaintiff ('Chan') and the defendant ('Camille') were college students. They were having a relationship but subsequently broke up due to differences. Only after the breaking up did Camille realise that she was pregnant. Thereafter Chan's parents (the first and second plaintiffs) and Camille's parents met to discuss the problem. The paternal grandparents had taken an active role during the pregnancy. After the birth of the baby (named Ryan), Camille and her parents claimed that they could not take Ryan home because their house was under renovation and because they did not have a babysitter. Hence, the paternal grandparents rented an apartment and engaged a confinement lady to take care of Camille and Ryan during her confinement. After the confinement period was over, Camille and her parents still maintained that they could not take Ryan home citing the same excuses. The paternal grandparents thus put Ryan in a nursery where Ryan stayed for the next three months. Ryan later developed rashes and was bleeding. The paternal grandparents thus took Ryan back to their house and Ryan had been there ever since. In order to take care of Ryan, the confinement lady who took care of him was engaged to be the nanny. Chan and his parents on the one hand and Camille and her parents on the other hand filed separate originating summonses wherein each group claimed for the guardianship, custody, care and control of Ryan. In the suit filed by Chan and his parents, only his parents and not Chan asked for guardianship, care and control of Ryan.

Held:

(1) Parliament intends that in matters coming under Guardianship of Infant Act 1961 the welfare of the child is of paramount importance. The GIA applies to illegitimate children (see paras 22–23).

(2) In considering who should be given the guardianship, custody, care and

control of Ryan, the court should also take into consideration the principles in s 88(3) of the Law Reform (Marriage and Divorce) Act 1976. Although this Act did not apply in this case, the principle could be used in order to determine what was the best interest of Ryan (see para 25).

(3) Care, custody and control should be given to the paternal grandparents due to the following reasons: (a) Both paternal grandparents had shown their care and concern for Camille and Ryan all the while; (b) From the age of about four months until now Ryan ended up being taken care of in the paternal grandparents' house where Ryan's father was also staying; and (c) there was no evidence that Camille and her parents could offer a better way of living than that provided by the paternal grandparents (see para 27).

(4) As regards guardianship, the paternal grandfather and Camille were made joint guardians. The paternal grandfather was made a guardian because of his role in the life and happiness of Ryan. As for Camille, it was only natural that she be made a joint guardian because she was Ryan's mother (see para 35).

[Bahasa Malaysia summary

Plaintif ketiga ('Chan') dan defendan ('Camille') adalah pelajar-pelajar kolej. Mereka mempunyai hubungan tetapi akhirnya berpisah akibat perbezaan pendapat. Hanya selepas berpisah Camille sedar yang dia mengandung. Ibu bapa Chan (plaintif-plaintif pertama dan kedua) dan ibu bapa Camille kemudiannya berjumpa untuk berbincang mengenai masalah tersebut. Datuk nenek sebelah bapa telah mengambil peranan yang aktif semasa mengandung. Selepas kelahiran bayi (yang dinamakan Ryan), Camille dan ibu bapanya mendakwa bahawa mereka tidak dapat membawa Ryan pulang kerana rumah mereka sedang dalam pengubahsuaian dan kerana mereka tidak mempunyai penjaga bayi. Maka, datuk nenek menyewa pangsapuri dan membayar bidan wanita untuk menjaga Camille dan Ryan semasa pantangnya. Selepas tempoh pantang berakhir, Camille dan ibu bapanya masih mengekalkan bahawa mereka tidak dapat membawa Ryan pulang dengan merujuk alasan yang sama. Datuk nenek oleh itu meletakkan Ryan di nurseri di mana Ryan tinggal untuk tiga bulan berikutnya. Ryan kemudiannya mendapat sakit ruam dan berdarah. Datuk nenek dengan itu mengambil Ryan pulang ke rumah mereka dan Ryan berada di situ sejak itu. Untuk menjaga Ryan, bidan wanita yang menjaganya diambil bekerja sebagai pengasuh. Chan dan ibu bapanya di satu pihak dan Camille dan ibu bapanya di pihak lagi satu memfailkan saman pemula berasingan yang mana setiap pihak menuntut untuk penjagaan, jagaan dan kawalan ke atas Ryan. Dalam saman yang difailkan oleh Chan dan ibu

bapanya, hanya ibu bapanya dan bukan Chan yang memohon untuk penjagaan, jagaan dan kawalan ke atas Ryan.

Diputuskan:

(1) Parlimen berniat bahawa dalam perkara yang terangkum di bawah Akta Penjagaan Bayi 1961 kebajikan kanak-kanak adalah amat penting. Akta diguna pakai kepada kanak-kanak tak sah taraf (lihat perenggan 22–23).

(2) Dalam mempertimbangkan siapa yang patut diberikan penjagaan, jagaan dan kawalan ke atas Ryan, mahkamah patut juga mengambil pertimbangan prinsip-prinsip dalam s 88(3) Akta Pembaharuan Undang-Undang (Perkahwinan dan Perceraian) 1976. Walaupun Akta ini tidak diguna pakai dalam kes ini, prinsip boleh digunakan untuk menentukan kepentingan terbaik untuk Ryan (lihat perenggan 25).

(3) Jagaan dan kawalan patut diberikan kepada datuk nenek sebelah bapa kerana alasan berikutnya: (a) Kedua-dua datuk nenek sebelah bapa telah menunjukkan kewajipan dan keprihatinan mereka untuk Camille dan Ryan selama ini; (b) Dari umur empat bulan hingga sekarang Ryan dijaga di rumah datuk nenek sebelah bapa di mana bapa Ryan juga tinggal; dan (c) tidak terdapat keterangan bahawa Camille dan ibu bapanya dapat memberikan cara hidup yang lebih baik daripada apa yang telah diberikan oleh datuk nenek sebelah bapa (lihat perenggan 27).

(4) Berkaitan penjagaan, datuk sebelah bapa dan Camille dibuat penjaga bersama. Datuk sebelah bapa diberi penjagaan kerana peranannya dalam kehidupan dan kebahagian Ryan. Berkaitan Camille, adalah semula jadi dia dijadikan penjaga bersama kerana dia adalah ibu Ryan (lihat perenggan 35).]

Notes

For cases on guardianship, see 7(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3609–3626.

Cases referred to

Khoo Cheng Nee v Lubin Chiew Pau Sing [1996] 4 MLJ 171, HC (refd)
Mahabir Prasad v Mahabir Prasad [1982] 1 MLJ 189, FC (folld)
Sean O' Casey Patterson v Chan Hoong Poh & Ors [2011] 4 MLJ 137, FC (folld)
Tan Siew Kee v Chua Ah Boey [1988] 3 MLJ 20, HC (folld)

Legislation referred to

Birth and Death Registration Act 1957 s 13A
Guardianship of Infant Act 1961 ss 1, 3
Law Reform (Marriage and Divorce) Act 1976 s 88(3)

KK Low (Josephin) for the plaintiff.
Malathi (Gandhi) for the defendant.

Noraini Abdul Rahman J:

[1] This is a love story that did not end happily ever after. However, there is an 'ever after' which the families of both the girl and the boy have to deal with and which result in them making applications to this court for the resolution of their problem.

[2] The story begins with a boy Chan Shan Chern and a girl, Camille Yap. They were school mates at the Sri Garden School in Cheras. Later both Camille and Chan Shan Chern ('Shan Chern') studied in *Kolej Tunku Abdul Rahman*. According to Camille in her affidavit in reply ('afidavit jawapan'), both she and Shan Chern started dating in the middle of 2009 where they became boyfriend and girlfriend. She was only 16 at that time. Their relationship was short lived that is, there were in relationship for about one year ie until either May or June 2010. Because of differences they broke up. At that time she was only 17 years old.

[3] At the time when they broke up Camille wasn't aware she was pregnant. She explained that she has irregular period and thought nothing of the fact that she did not have her period. She also attributed that not getting her period was stress related. Only after they broke up which was sometime in March, did she know she was pregnant in April 2010 and at that time she was five months pregnant. She told her parents and Shan Chern her ex-boyfriend and father of the unborn child she was carrying. Thereafter both parents met to discuss the problem of their college going children. At this point, I would like to mention that in the various affidavit filed, there were allegations and counter allegations made but of special importance was Camille's allegation that she was asked to abort the baby in China by Shan Chern's parents but she refused. On the other hand, Shan Chern's parents denied ever asking Camille to abort the baby. To my mind, the question of abortion may have possibly been mooted but nothing happened. There was no abortion and a child by the name of Ryan was born on 9 December 2010.

[4] By her own admission in her affidavit, Camille averred Shan Chern's parents had taken an active role during her pregnancy and had come to the hospital to visit her and baby Ryan was born. Camille alleged Shan Chern never visited Ryan in hospital.

[5] When Camille and Ryan were to be discharged a big problem arose. According to Camille and supported by her parents in their affidavits, they could not take Ryan home for two reasons:

(a) their house was under renovation; and

(b) they did not have a babysitter.

[6] Without going into detail, it is common ground and an undisputed fact that San Chern's parents (who are the paternal grandparents of Ryan) offered to take care of the problem. Camille admitted in her affidavit (paras 24 and 25 of encl 6) that Shan Chern's parents offered to rent an apartment and to engage a confinement lady to take care of Camille and Ryan during her confinement. Camille and her parents agreed to this. So Camille and Ryan were in the apartment. It was not disputed that Shan Chern's parents paid for the rental of the apartment and the confinement lady.

[7] During confinement, it would appear that all grandparents visited mother and child. Except for allegations and denials of Camille's going out at night and also taking her bath at night, everything seemed to be okay. The issue of Camille going out was to score a point to show her lack of parental care to Ryan and this was of course vehemently denied by Camille. I must state here I have read all the affidavits on this issue and I must say that my decision at the end of this judgment would have taken into consideration this issue.

[8] Now, after the confinement period was over, again another problem crop up — who should take care of Ryan?. As far as the birth certificate was concerned, Camille took care but this too would become an issue because the first birth certificate was without the name of the father Chan Shan Chern which subsequently, upon application to the fourth defendant, Ketua Pendaftar Kelahiran dan Kematian, a second birth certificate was issued which contain information that Shan Chern was the father but that the name of Ryan had now been changed from Ryan Yap to Ryan Chan Lai Ern. This is again another big issue which will be dealt later.

[9] But first back to the question who should take Ryan home after confinement. Remember that Camille's house was still under renovation and she and her parents could still not find a babysitter. So, to solve the problem, Shan Chern's mother offered a solution. She had gone around hunting for a suitable nursery for Ryan and she suggested a nursery located in Taman Tun Dr Ismail. According to Camille's own admission in her affidavit at para 28 of encl 6, 'Saya serta ibu bapa saya telah periksa 'nursery' tersebut dan mendapati bahawa ia adalah bersesuaian untuk menjaga Ryan untuk beberapa bulan'.

[10] And so Ryan was put in the nursery and he continued to be visited by both families. Again Camille alleged that Shan Chern did not visit Ryan although his parents did and Ryan continued to stay in the nursery for the next three months until another issue arose. This time, Ryan had developed rashes and was bleeding. Although how and why Ryan was taken from them became a matter of dispute and allegation and counter allegation, the hard fact and

reality was Ryan's paternal grandparents took him into their house and he had been there ever since. In order to take care of Ryan, the confinement lady who took care of him was engaged to be the nanny. Now, this court took note of this development because it means Ryan would take to the nanny and that they were bonding with each other.

[11] To cut a very long story short, Ryan's paternal grandparents as well as his father Shan Chern have on 6 March 2012 filed an OS 24–37–03 of 2012 praying for the following reliefs:

(a) plaintif pertama dan plaintif kedua diberi hak penjagaan, jagaan, pemeliharaan dan kawalan (guardianship, custody, care and control) sepenuhnya ke atas Anak bernama Ryan Cha Lai Ern (No Sijil Beranak: CJ83189) ('anak tersebut') dan adalah bertanggungjawab bagi kebajikan Anak tersebut dari segi jagaan, sokongan, kesihatan, pendidikan dan tumbesaran;

(b) plaintif pertama dan plaintif kedua akan bertanggungjawab kepada nafkah hidup anak tersebut;

(c) deklarasi bahawa Sijil Beranak No CJ83189 dengan No Siri F875410 yang didaftarkan pada 21 Disember 2010 dan dicabut pada 5 Disember 2011 dan maklumat yang terkandung di dalamnya dalah betul dan adalah sijil beranak yang sah bagi anak tersebut;

(d) defendan diberi hak akses yang munasabah kepada anak tersebut di dalam kehadiran plaintif-plaintif;

(e) plaintif pertama dan plaintif kedua dilantik sebagai penjaga-penjaga sah anak tersebut di sisi undang-undang dan mempunyai hak atau kewajipan untuk mengurus dengan segala urusan rasmi dan kehidupan anak tersebut;

(f) Kos permohonan ini dijadikan kos dalam kausa; dan

(g) relif-relif lain yang mahkamah mulia ini anggap patut dan sesuai.

[12] In the above action, Ryan's paternal grandparents and father are the plaintiff's and his mother Camille is the defendant.

[13] About four months later, Ryan's mother and his maternal grandparents filed OS 24–124–07 of 2012 praying for the following reliefs:

(a) (i) plaintif pertama yang merupakan ibu kandung kepada Anak bernama 'Ryan Chan Lai Ern/Ryan Yap' (anak tersebut) diberikan hak penjagaan, jagaan, pemeliharaan dan kawalan (guardianship, custody, care and control) sepenuhnya ke atas anak tersebut; atau

(ii) plaintif pertama bersama dengan plaintif kedua dan plaintif ketiga

diberikan hak penjagaan, jagaan, pemeliharaan dan kawalan (guardianship, custody, care and control) sepenuhnya ke atas anak tersebut;

(b) defendan pertama, defendan kedua dan defendan ketiga menyerah balik anak tersebut kepada plaintif pertama dalam tempoh satu hari dari tarikh Perintah Mahkamah diberikan;

(c) defendan pertama, defendan kedua dan defendan ketiga menyerah balik sijil kelahiran asal anak tersebut kepada plaintif pertama dalam tempoh satu hari dari tarikh perintah mahkamah diberikan;

(d) defendan pertama, defendan kedua dan defendan ketiga diberikan akses munasabah kepada anak tersebut dengan pengawasan;

(e) deklarasi bahawa penukaran nama anak tersebut daripada 'Ryan Yap' kepada 'Ryan Chan Lai Ern' adalah batal dan tidak sah (null and void);

(f) defendan Keempat membetulkan pendaftaran dan sijil kelahiran Anak tersebut untuk membetulkan nama Anak tersebut sebagai 'Ryan Yap';

(g) kos; dan

(h) relif-relif lain yang mahkamah yang mulia ini anggap patut dan sesuai.

[14] A closer look at the two OS would show that both sides would like to get guardianship, custody, care and control of Ryan and further and other reliefs.

[15] Now thrown into this situation is another application by Ryan's paternal side to cross-examine his mother Camille as they alleged that Camille had not told the truth in her affidavit and that the statement averred were confusing. That is encl 13 of case No 24-37-03 of 2013. The Notice *Permohonan* is reproduced below:

NOTIS PERMOHONAN

Benarkan semua pihak yang berkenaan hadir di hadapan Timbalan Pendaftar dalam kamar pada 6 Sept 2012 pukul 9.00 pagi sebutan permohonan Plaintif-Plaintif di bawah Aturan 28 Kaedah 4(3), Aturan 38 Kaedah 2 dan Aturan 92 Kaedah 4 Kaedah-Kaedah Mahkamah 2012 bagi perintah-perintah seperti berikut:

1) Bahawa Defendan dikehendaki dalam tempoh yang ditetapkan oleh Mahkamah menghadiri di hadapan Hakim dalam Kamar dan di situ hendaklah dikemukakan untuk diperiksa balas atas sumpah bagi deposinya dalam Afidavit Jawapan Defendan yang diikarkan pada 29 Mei 2012 dan 23 Julai 2012 dan di situ juga hendaklah mengemukakan perihalkan dokumen, jika ada, yang dikehendak dikemukakan;

2) Bahawa Mahkamah merekodkan keterangan Defendan mengikut amalan Mahkamah mengenai pemeriksaan balas saksi-saksi dan hendaklah

menyebabkan Defendan menandatangani deposisinya di hadapan Hakim sebagai keterangan Defendan di bawah sumpah dan digunapakai dalam prosiding ini;

3) Kos permohonan ini ditanggung oleh Defendan; dan

4) Lain-lain relif yang Mahkamah anggap sesuai dan manfaat.

[16] I propose to deal with encl 1 of both the OS filed by the paternal side and the maternal side.

[17] I would like to state from the beginning that at this moment in time both Ryan's parents are still young adults — both are 19 years old are still studying in college. In both their affidavits, and the affidavits of their parents, both are going to rely heavily on their parents for support whether it is financial support or otherwise. Both are not earning any income and in fact both would still depend on their parents financially to feed them, clothe them, put a roof over their head and pay for the educational expenses. Both have to attend classes and both are barely able to become parents to Ryan. However both families are without doubt very concerned about Ryan's future and that's why they had come to court to resolve their problem.

[18] Counsel for Camille submitted that she and her parents are seeking for guardianship care, custody and control of Ryan. She said Ryan's father Shan Chern is not asking for guardianship, care and control. Instead his parents are.

[19] Now as I had stated above, both are 19 years of age, not working, still studying in college. They both don't have income.

[20] The court will have to look carefully and consider as to whom guardianship, care, custody and control should be given, based on the submissions of counsel and also, the documentary evidence.

[21] Firstly, this court looked at the provision of s 1 of the Guardianship of Infant Act 1961 which is reproduced below:

Matters to be considered.

The Court or a Judge, in exercising the powers conferred by this Act, shall have regard primarily to the welfare of the infant and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be.

[22] It is very clear that Parliament intends that in matters coming under the said Act, the welfare of the child is of paramount importance.

[23] In the Federal Court case of *Sean O' Casey Patterson v Chan Hoong Poh & Ors* [2011] 4 MLJ 137, His Lordship James Foong delivering the judgment of the Federal Court said:

> It is not in dispute that J is illegitimate. When he was born, both the plaintiff and first defendant were not married to each other.
>
> … If Parliament had intended this Act to apply only to a legitimate child it could have kept silent on the issue of legitimacy in this section like in the remaining part of the Act. There is necessary to express this to cover an illegitimate child in s 1(3)(a).

[24] So obviously the GIA apply to illegitimate children. Later in his judgment, he adopted what was stated by Chan Sek Keong JC in the Singapore case of *Tan Siew Kee v Chua Ah Boey* [1988] 3 MLJ 20 at p 21. This is what James Foong FCJ said:

> And in respect of the welfare of the child, we would adopt what was stated by Chan Sek Keong JC (as he then was) in the Singapore case of *Tan Siew Kee v Chua Ah Boey* [1988] 3 MLJ 20 at p 21:
>
> > The expression 'welfare' under s 3 of the Guardianship of Infant Act (Cap 122, 1985 Ed) is to be taken in its wider sense. It means the general well being of the child and all aspects of his upbringing, religious, moral as well as physical. His happiness, comfort and security also go to make up his well being. A loving parent with a stable home is conducive to the attainment of such well being. It is not to be measure in monetary terms.
>
> And when deliberating, the Court should adopt xa process whereby, when all the relevant facts, relationship, claims and wishes of parents, (and potential adopters) risks, choices and other circumstances are taken into account and weighted, the course to be followed will be that which is most in the interests of the child's welfare as that term has now to be understood' — Lord MacDermott in *J and another v C and others* [1970] AC 668 at pp 710–711 and *Halsbury's Laws of England* (4th Ed), Reissue, (Mackay), para 443.
>
> As we have suggested, the meaning of welfare must be considered in the widest sense and all factors necessary to be taken into account must be weighed against one another to arrive at a decision. It is impossible for us to lay down any specifics since circumstances in each case are so infinitely varied where even decided case a precedent has limited application. In this respect we answer the third question in the positive.

[25] In considering who should be given the guardianship, custody, care and control of Ryan, this court also take into consideration the principles in s 88(3) of the Law Reform (Marriage and Divorce) Act 1976 (LRA). Although this Act does not apply in our case, the principle can be used in order to determine what is the best interest of Ryan. I refer to s 88(3) of the LRA which is reproduced as follows:

> There shall be a rebuttable presumption that it is for the good of a child below the age of seven years to be with his or her mother but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of a child by changes of custody.

[26] In the celebrated case of *Mahabir Prasad v Mahabir Prasad* [1982] 1 MLJ 189, the Federal Court said:

> In short the learned judge has given the overriding consideration of the welfare of the children uppermost in his mind. That, we think, is the correct approach. We would state categorically that must be first and paramount consideration and other considerations must be subordinate. The mere desire of a parent to have his children must be subordinate to the consideration of the welfare of the children, and can be effective only if it coincides with their welfare. Consequently, it cannot be right to speak of the pre-eminent position of the parents alone, or their exclusive right to the custody of the children, when their future is being considered by the court.

[27] Guided and applying my mind to the laws and authorities cited above, I evaluate the evidence in order to arrive at a just decision for Ryan for it is his welfare that this court will have to decide. I am of the opinion that care, custody and control should be given to the paternal grandparents ie the first and second plaintiffs in Case No 24–37–03 of 2012. My reasons are as follows:

(a) both plaintiffs had shown their care and concern for Camille and Ryan during their stay in the hospital when Ryan was born. I must also acknowledge, both Camille's parents too had shown their care and concern. The issue of abortion is irrelevant in so far as the court is concerned. It could be that was the reaction of the first and second plaintiffs after hearing the shocking news of Camille's pregnancy but the fact is that Camille carried the baby to full term and delivered a healthy baby. Then, when Camille's parents indicated they could not take Camille and Ryan into their house because their house was still under renovation and no babysitter had been found, the first and second plaintiffs offered to rent a condominium for Camille and Ryan to stay during her confinement. Not only that, they also looked for and paid for a confinement lady to look after her and Ryan. This fact is never in dispute and in fact, is admitted by Camille although she did aver that what the two plaintiffs did was on their own accord. In short they volunteered to pay. Whatever the circumstances, the fact is that they looked for the confinement lady and paid for her as well as paying for the condominium. Camille's parents would volunteer to share the costs if they were so concerned about Camille and Ryan. But there is no evidence to that effect;

(b) again, there were allegations and counter allegations of Camille's conduct during confinement. The fact remains that she did go out as evidence by the affidavit of the confinement lady, Chong Siew Lan (encl 9). When the confinement period was nearly ending again the issue of where Ryan should stay and be taken care of became a problem. Camille and her parents still maintained that the house renovation was still not completed and they still could not find a babysitter. Again the second plaintiff came to the rescue. She had gone around and found a suitable nursery in Taman Tun Dr Ismail. She informed Camille and her family and they all agreed that Ryan should be sent there;

(c) After approximately three months in the said nursery, Ryan developed rashes and was bleeding. Events as to how Ryan was taken to hospital for treatment and eventually into the house of first and second plaintiff's were not so clear simply because each party had given their own version. The undisputed fact is that Ryan ended up being taken care of in the first and second plaintiffs house where the third plaintiff (the father) is also staying. During and up until now, Camille and her parents would visit Ryan although there were allegations that at times they were not allowed to visit because Ryan was sleeping. It is therefore very clear that from the age of about four months until now (when he is 2 years and 10 months), Ryan was and is still staying with the first, second and third plaintiffs. As such, I think it is only proper, for the welfare of the child, Ryan should remain with the plaintiffs; and

(d) in coming to the above conclusion, I had also taken into consideration very seriously the full import and impact of the principles of s 88(3) of the LRA. Remember Ryan was and still is living with the plaintiffs who had employed the confinement lady to be the babysitter. It was because of the necessity for important events that the plaintiffs now apply to formalise what had so far been a convenient arrangement for purposes of dealing with the authorities in the development of Ryan ie schooling, passport etc. Would it be fair to Ryan to take him away from the comfort of his house and if so, Camille and her parents must show that they can offer a better way of living than that provided by the plaintiffs. I tried looking for evidence in their affidavits but I could not find anything.

[28] In the case of *Khoo Cheng Nee v Lubin Chiew Pau Sing* [1996] 4 MLJ 171. Abdul Wahab Patail J (as he then was) said:

> The second part of s 88(3), however, stresses an underlying principle we should not overlook: 'the Court shall have regard to the undesirability of disturbing the life of a child by changes of custody'. The starting point is, therefore, that it is undesirable to disturb the life of a child by changes of custody. *A party seeking an order for custody away from their current arrangements must therefore show that what he or she offers benefits the welfare of the children better. The court must evaluate whether the*

improvement to the welfare of the child is sufficient to justify disturbing the life of the child by that change of custody. It has to be shown there will be positive advantages accruing for the welfare of the children by that change. Those advantages must be real and nor merely promissory or speculative. (Emphasis added.)

[29] In our case, there is no evidence adduced by Camille and her parents that they could give or offer better benefits involving the welfare of Ryan. Again saying that they would be able to offer better benefits or welfare without any supporting evidence is not good enough. As Abdul Wahab Patail J (as he then was) said, 'It has to be shown there will be positive advantages accruing for the welfare of the children by that change. Those advantages must be real and not merely promissory or speculative.'

[30] From the affidavits filed, I find that the first and second plaintiffs had taken care of and looked after the welfare of Ryan very well. There are evidence they had taken Ryan to various hospitals and clinics ie Tung Shin Hospital, Prince Court Medical Centre (where he was hospitalised once) and Clinic Mediviron (see encl 18). The above are the welfare as regards health and the court took note, all medical bills were paid by the first plaintiff.

[31] But there are others too. For example, Ryan was enrolled, attended and still is attending a kindergarten known as KL Kids Club, International Kindergarten at Jalan U Thant. Again the fees of RM7,300/= per term was paid by the first plaintiff.

[32] On top of it, there were happy photographs of Ryan's birthday party organised by the plaintiffs where Camille was also present. There are also happy photographs of Ryan, of them having dinner at Modesto. This fact is important because it shows that even though both his parents are not likely to marry each other, they can be cordial and therefore access becomes that much more pleasant.

[33] As for holidays, Ryan had been to Genting Highlands, Indonesia and Singapore.

[34] With all the above evidence, I find that for his wellbeing and welfare, it met criteria mentioned by Chan Sek Keong JC (as he then was) in the case of *Tan Siew Kee v Chua Ah Boey* [1988] 3 MLJ 20 which was cited with approval by our Federal Court in the case of *Sean O'Casey Patterson v Chan Hoong Poh & Ors* [2011] 4 MLJ 137. I have carefully considered the facts, evidence and law and it weighed heavily in favour of the first and second plaintiffs being given care, custody and control of Ryan with the three defendants being given reasonable access as prayed for in para 4 of the plaintiffs Case 24-37-03 of 2012.

[35] As regards guardianship, again I have to really consider it very carefully. There are five people asking for guardianship. On the one side, it is the first and second plaintiffs and on the other side, it is all the three defendants. To put all of them as joint guardians would invite confusion and inconvenience — for example, all would have to agree what school Ryan should attend and later on in life which college or university and in between there will be many decisions to be made. Having said that, this court recognise the fact that both sides must participate in the development of Ryan. Ryan's father ie the third plaintiff did not ask for guardianship. Camille on the other hand ask for guardianship. As such, I am of the opinion that there should be joint guardianship between first plaintiff and defendant ie the guardians are Chan Eng Lim and Camille Yap. The reason for my decision that the first plaintiff be made a joint guardian is because of the overwhelming evidence of his role in the life and happiness of Ryan. He paid for the hospital bills, school fees and presumably all those holidays. As for Camille, it is only natural that she be made a joint guardian because she is Ryan's mother.

[36] I now come to the question of the birth certificate of Ryan. In Case 24–37–03 of 2012 which is the plaintiff's case, they are seeking a declaration that the birth certificate is valid whilst the defendant in Case No 24–124–07 of 2012 is seeking the declaration that the change of name from Ryan Yap to Ryan Chan Lai Ern is null and void. For this, the defendants named Ketua Pendaftar Kelahiran dan Kematian as a party.

[37] Now before I make any decision, it is better to carefully consider the provision of s 13A of the Birth and Death Registration Act 1957 which is reproduced as follows:

> Surname of child
>
> 13A(1) The surname, if any to be entered in respect of a legitimate child shall ordinarily be the surname, if any, of the father.
>
> (2) The surname, if any, to be entered in respect of an illegitimate child may where the mother is the informant and volunteers the information, be the surname of the mother, provided that where the person acknowledging himself to be the father of the child in accordance with section 13 requests so, the surname maybe the surname of that person.

[38] Puan Natra Idris, senior federal counsel, acting on behalf of Pendaftar Kelahiran dan Kematian submitted the following:

> Dari sudut undang-undang pihak kami tidak akan menyentuh berkenaan fakta kes ini.

Seksyen 13A (2) - GIA membenarkan surname anak tidak sah taraf di letakkan atas nama bapa. Justeru ini sekiranya syarat-syarat dan keperluan yang dinyatakan dalam peruntukkan tersebut dipatuhi proses permohonan nama boleh dilakukan.

From the affidavit filed by the Plaintiff in case 124, tiada aligasi spesifik terhadap defendan ke empat yang memerlukan defendan ke empat untuk menjawab. They just seek relief against fourth defendant.

[39] As such, because there only allegations made with no substantive evidence, and because s 13A of the Birth and Death Registration Act 1957, I am allowing prayer 3 of case 24–37–03 of 2012.

[40] In conclusion I am making the following order:

(a) bahawa Chan Eng Lim dan Gan Hui Ping diberi hak jagaan, kawalan dan pemeliharaan (care, custody and control) seorang kanak-kanak bernama Ryan Chan Lai Ern;

(b) bahawa Chan Eng Lim dan Camille Yap diberi hak penjagaan bersama (joint guardianship) kanak-kanak bernama Ryan Chan Lai Ern;

(c) bahawa akses yang munasabah diberi kepada Camille Yap, Steve Yap Sin Wei dan Jean Marie Aw Jin Lian;

(d) bahawa Sijil Beranak No SJ83189 dengan no siri F875410 yang didaftarkan pada 21 Disember 2010 dan dicabut pada 5 Disember 2011 dan maklumat yang terkandung di dalamnya adalah betul dan adalah sijil beranak yang sah bagi anak tersebut;

(e) bahawa Sijil Kelahiran asal disimpan oleh Chan Eng Lim dengan salinan diberi kepada Camille Yap dalam masa tiga hari dari tarikh perintah ini;

(f) kos ditanggung oleh pihak masing-masing.

[41] It is now time for me to consider the application at encl 13 ie plaintiff's application in Case 24–37–03 of 2012 to cross-examine Camille. As I was able to come to a decision based on oral submissions, written submissions, all affidavits filed together with relevant exhibits, I find that there is no necessity to allow such cross-examination. Therefore encl 13 is dismissed with no order as to cost.

Order accordingly.

Reported by Kanesh Sundrum